

**RICHARD B. KELLY,** )  
 )  
 **Plaintiff,** )  
 )  
 **vs.** ) **CIVIL NO. 08-cv-322-GPM**  
 )  
 **JACOB NULL, *et al.*,** )  
 )  
 **Defendants.** )

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its face.” *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007). Upon careful review of the complaint and the supporting exhibits, the Court finds that no claim in the original complaint may be dismissed at this point in the litigation.

### **THE COMPLAINT**

Plaintiff alleges that on February 19, 2007, he was beaten and sexually assaulted by Defendant Null with the assistance of Defendant Sisk and “Unknown Tact C/O’s.” Giving the complaint a liberal reading, Plaintiff also appears to claim that Defendants Branch and Osman condoned or approved of these actions or, alternatively, failed to adequately supervise Defendant Null and the other officers involved in the assault. Finally, Plaintiff asserts that he was denied adequate medical care for his serious injuries (bleeding from the rectum) by Defendants Caliper and Powers. Plaintiff claims that these actions violated his Eighth Amendment rights.

### **DISCUSSION**

The intentional use of excessive force by prison guards against an inmate without penological justification constitutes cruel and unusual punishment in violation of the Eighth Amendment and is actionable under Section 1983. *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992); *DeWalt v. Carter*, 224 F.3d 607, 619 (7<sup>th</sup> Cir. 2000). “[W]henver prison officials stand accused of using excessive physical force in violation of the Cruel and Unusual Punishments Clause, the core judicial inquiry is . . . whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.” *Hudson*, 503 U.S. at 6-7. An inmate seeking damages for the use of excessive force need not establish serious bodily injury to make a claim, but not “every malevolent touch by a prison guard gives rise to a federal cause of action. . . . [the] prohibition of ‘cruel and unusual’ punishment necessarily excludes from constitutional

recognition de minimis uses of physical force, provided that the use of force is not of a sort ‘repugnant to the conscience of mankind.’” *Id.* at 9-10; *see also Outlaw v. Newkirk*, 259 F.3d 833, 837-38 (7<sup>th</sup> Cir. 2001).

Additionally, the Supreme Court has recognized that “deliberate indifference to serious medical needs of prisoners” may constitute cruel and unusual punishment under the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). However, “negligence alone, or simple malpractice, is insufficient to state a claim for relief,” *Kelly v. McGinnis*, 899 F.2d 612, 616 (7<sup>th</sup> Cir. 1990), as is the provision of medical treatment other than that preferred by the inmate. *Estelle*, 429 U.S. at 107. *See also Jones v. Simek*, 193 F.3d 485, 489 (7<sup>th</sup> Cir. 1999); *Steele v. Choi*, 82 F.3d 175, 178 (7<sup>th</sup> Cir. 1996), *cert. denied*, 519 U.S. 897 (1996).

Applying these standards to the allegations in the complaint, the Court is unable to dismiss any portion of the complaint at this point in the litigation. *See* 28 U.S.C. § 1915A.

#### **MOTION FOR APPOINTMENT OF COUNSEL (DOC. 3)**

Plaintiff requests that the Court appoint him counsel (Doc. 3). There is no absolute right to appointment of counsel in a civil case. *Cook v. Bounds*, 518 F.2d 779 (4<sup>th</sup> Cir. 1975); *Peterson v. Nadler*, 452 F.2d 754 (8<sup>th</sup> Cir. 1971). When presented with a request to appoint counsel, the Court must make the following inquiries: “(1) has the ... plaintiff made a reasonable attempt to obtain counsel or effectively been precluded from doing so and (2) given the difficulty of the case, does the plaintiff appear competent to litigate it himself.” *Pruitt v. Mote*, 503 F.3d 647, 854-55 (7<sup>th</sup> Cir. 2007). With regard to the first step of the inquiry, Plaintiff states that he “wrote some lawyers to if they’ll take the case free but none will.”

With regard to the second step of the inquiry, “the difficulty of the case is considered against

the plaintiff's litigation capabilities, and those capabilities are examined in light of the challenges specific to the case at hand." *Id.* Plaintiff's claims are not that factually complex. From a legal standpoint, the litigation of any constitutional claim falls in the range of complex. Nevertheless, based on Plaintiff's pleadings in this case and based on Plaintiff's representation of himself in other cases, *Kelly v. Null*, No. 3:07-cv-339 (S.D. Ill.), this Court concludes that - at this time - Plaintiff appears to be competent to litigate his case. Therefore, Plaintiff's motion for the appointment of counsel will be **DENIED**, without prejudice.

#### **DISPOSITION**

The Clerk is **DIRECTED** to prepare Form 1A (Notice of Lawsuit and Request for Waiver of Service of Summons) and Form 1B (Waiver of Service of Summons) for Defendants **NULL, POWERS, SISK, CALIPER, BRANCH, and OSMAN**. The Clerk shall forward those forms, USM-285 forms submitted by Plaintiff, and sufficient copies of the complaint to the United States Marshal for service.

The United States Marshal is **DIRECTED**, pursuant to Rule 4(c)(2) of the Federal Rules of Civil Procedure, to serve process on Defendants **NULL, POWERS, SISK, CALIPER, BRANCH, and OSMAN** in the manner specified by Rule 4(d)(2) of the Federal Rules of Civil Procedure. Process in this case shall consist of the complaint, applicable forms 1A and 1B, and this Memorandum and Order. For purposes of computing the passage of time under Rule 4(d)(2), the Court and all parties will compute time as of the date it is mailed by the Marshal, as noted on the USM-285 form. Service shall not be made on the "Unknown Tact C/O's" involved until such time as Plaintiff has identified them by name on a USM-285 form and in a properly filed amended complaint. Plaintiff is ADVISED that it is Plaintiff's responsibility to provide the Court with the

names and service addresses for these individuals.

With respect to former employees of Illinois Department of Corrections who no longer can be found at the work address provided by Plaintiff, the Department of Corrections shall furnish the Marshal with the Defendant's last-known address upon issuance of a court order which states that the information shall be used only for purposes of effectuating service (or for proof of service, should a dispute arise) and any documentation of the address shall be retained only by the Marshal. Address information obtained from I.D.O.C. pursuant to this order shall not be maintained in the court file, nor disclosed by the Marshal.

The United States Marshal shall file returned waivers of service as well as any requests for waivers of service that are returned as undelivered as soon as they are received. If a waiver of service is not returned by a defendant within **THIRTY (30) DAYS** from the date of mailing the request for waiver, the United States Marshal shall:

- Request that the Clerk prepare a summons for that defendant who has not yet returned a waiver of service; the Clerk shall then prepare such summons as requested.
- Personally serve process and a copy of this Order upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure and 28 U.S.C. § 566(c).
- Within ten days after personal service is effected, the United States Marshal shall file the return of service for the defendant, along with evidence of any attempts to secure a waiver of service of process and of the costs subsequently incurred in effecting service on said defendant. Said costs shall be enumerated on the USM-285 form and shall include the costs incurred by the Marshal's office for photocopying additional copies of the summons and complaint and for preparing new USM-285 forms, if required. Costs of service will be taxed against the personally served defendant in accordance with the provisions of Federal Rule of Civil Procedure 4(d)(2) unless the defendant shows good cause for such failure.

Plaintiff is **ORDERED** to serve upon defendant or, if appearance has been entered by counsel, upon that attorney, a copy of every further pleading or other document submitted for

consideration by this Court. He shall include with the original paper to be filed with the Clerk of the Court a certificate stating the date that a true and correct copy of any document was mailed to defendant or his counsel. Any paper received by a district judge or magistrate judge which has not been filed with the Clerk or which fails to include a certificate of service will be disregarded by the Court.

Defendants are **ORDERED** to timely file an appropriate responsive pleading to the complaint, and shall not waive filing a reply pursuant to 42 U.S.C. § 1997e(g).

Pursuant to Local Rule 72.1(a)(2), this cause is **REFERRED** to a United States Magistrate Judge for further pre-trial proceedings.

Further, this entire matter is hereby **REFERRED** to a United States Magistrate Judge for disposition, as contemplated by Local Rule 72.2(b)(2) and 28 U.S.C. § 636(c), *should all the parties consent to such a referral.*

Plaintiff is under a continuing obligation to keep the Clerk and each opposing party informed of any change in his whereabouts. This shall be done in writing and not later than seven (7) days after a transfer or other change in address occurs.

Plaintiff's motion for appointment of counsel (Doc. 3) is **DENIED** without prejudice.

**IT IS SO ORDERED.**

DATED: 10/20/08

*s/ G. Patrick Murphy*  
G. PATRICK MURPHY  
United States District Judge